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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 296

SAM ORMONT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 1646–1707) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1949. (R. 1709.) A petition for rehearing was denied August 1, 1949. (R. 1710.) The petition for writ of certiorari was filed on August 29, 1949. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in discharging a jury which had been impaneled and sworn, because of a remark by government counsel which might have prejudiced the petitioner, and proceeding to trial before a second jury.

2. Whether certain testimony of an accountant, employed by the petitioner's attorney in connection with the petitioner's income tax matters, as to disclosures made by the petitioner to the accountant in the presence of two revenue agents was privileged.

3. Whether reversible error arose out of the following matters:

(a) Out of the holding of the trial court that the petitioner was not immune from prosecution because he had testified before a grand jury investigating O. P. A. violations by others.

(b) Out of the holding of the trial court that the petitioner suffered no prejudice as a result of the service of a subpoena *duces tecum* upon him in the presence of the jury, but without it appearing that the jury was aware of such service, the subpoena having been quashed.

(c) Out of the trial court's refusal to strike all of the evidence adduced relating to the petitioner's attempts to evade his 1942 and 1943 income taxes.

(d) Out of certain statements made by the Assistant United States Attorney to the jury in

his summation and out of certain portions of the instructions of the court to the jury, neither of which were objected to at the time.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

Petitioners, Sam Ormont and Phillip Himmelfarb, were jointly indicted on January 22, 1947, in the United States District Court for the Southern District of California, in four counts.[1]

[1] Petitioners were indicted and tried jointly in the District Court but took separate appeals to the Court of Appeals, filed separate petitions and briefs for writs of certiorari, and do

Count one charged that petitioners wilfully attempted to defeat and evade the federal income tax liability of petitioner Ormont for the calendar year 1944. Count two contained a similar charge against both petitioners in connection with Himmelfarb's income tax liability for the calendar year 1944.[2] Counts three and four contained similar charges against petitioner Ormont alone as to his income tax liabilities for the calendar

not predicate their petitions upon identical grounds. The Government is filing separate briefs in opposition but will present a consolidated statement of the facts which will be incorporated by reference in the Government's brief in the companion case of *Himmelfarb* v. *United States*, No. 295.

[2] The following table, based on the indictment, shows the amounts by which petitioners were alleged to have understated their incomes and tax liabilities.

SAM ORMONT

NET INCOME

Year	Per return	Per indictment	Difference
1944	$12,174.57	$36,982.52	$24,807.95

TAX

1944	$3,626.58	$18,143.12	$14,516.54

PHILLIP HIMMELFARB

NET INCOME

1944	$4,111.74	$17,752.65	$13,640.91

TAX

1944	$656.00	$5,843.91	$5,187.91

years 1943 and 1942, respectively. (R. 2–6.) After a trial by a jury, Ormont was found guilty upon count one of the indictment and Himmelfarb guilty on count two (R. 133), the trial court having previously dismissed counts two, three, and four of the indictment as to Ormont and count one as to Himmelfarb. After denying motions for acquittal and for a new trial (R. 134–136), the court on June 16, 1947, sentenced each of the petitioners to imprisonment for a term of one year and one day (R. 137–140). On appeal, the Court of Appeals for the Ninth Circuit on June 3, 1949, affirmed the judgments of conviction and on August 1, 1949, denied petitions for rehearing. (R. 1708–1710.)

The facts disclosed by the voluminous record in this case are not in essence complex. The petitioners, Ormont and Himmelfarb, during a period which extended at least from May 1, 1944, to April 30, 1945, operated as a joint enterprise[3] a wholesale meat business known as the Acme Meat Company. The business was conducted, and a regular set of books was kept, on a calendar year basis.

[3] The evidence showed that for all practical purposes Ormont treated Himmelfarb as a partner. (R. 913, 925–926, 928, 1035–1036.) Ormont, however, caused Himmelfarb to be falsely shown on the books as an employee rather than a partner, because he feared that revelation of the truth to other government agencies to whom he had represented that he was doing business as an individual might "cause him embarrassment" and possibly interfere with his receipt of certain subsidies. (R. 439, 1137–1138.)

The evidence showed that during the period May 1, 1944 to April 30, 1945, the petitioners received in cash sums totalling a little more than $70,000 from overcharges (which Ormont preferred to call "bonuses" or "gifts") on meat sold to their customers (R. 1138–1141), these illegal profits being divided equally between the petitioners every day, or every three days. (R. 1035–1036, 1139–1141.) The amounts received in this manner were not recorded on the books of the Acme Company [4] nor reported by either petitioner on the individual income tax return filed by him for the calendar year 1944. (R. 414–416, 421–425, 435, 1138–1141; Gov't Ex. 3, 4, 50–C, 51–D.)

On May 18, 1945, about two months after they had filed their returns for the calendar year 1944, the petitioners learned from agents of the Bureau of Internal Revenue that their income tax returns for the years 1942 to 1944 were under investigation. They immediately sought the advice of a lawyer and an accountant and, on May 24, 1945, filed a "partnership" return showing an income of $71,388.84, equally divided between the petitioners, from "miscellaneous enterprises." These miscellaneous enterprises had, purportedly, been conducted on the basis of a fiscal year running

[4] Ormont kept a small memorandum book in which he jotted down the share of the excess charges received by him—about $35,000 during the period in question. About $11,000 of this amount was received in 1944. He permitted agents of the Bureau of Internal Revenue to examine and copy this data. (R. 1139–1140.)

from May 1, 1944, to April 30, 1945. (R. 383, 1091 *et seq.*, 1127–1128, 1132, Govt. Ex. 6.)

Such other facts as are relevant to the issues sought to be raised by the petitioner Ormont will be briefly stated in the Argument.

ARGUMENT

1. The petitioner asserts, as one of his two "reasons relied on for the allowance of the writ"[5] that he was placed in double jeopardy because the trial court discharged a jury which had been impaneled and sworn to try him on the charge of which he was convicted by a second jury.

When the case was called for trial before the first jury, before opening statements were made or witnesses called, Himmelfarb's attorney made a motion (in which the petitioner Ormont did not join) that a juror be withdrawn and a mistrial declared because of the Assistant United States Attorney's reference to a "pending OPA case" against the petitioners (R. 257). The District Court, finding that there was a possibility that the defendants had been prejudiced, granted the motion (R. 259).

It is clear under the holdings of this Court that "courts of justice are invested with the authority

[5] Although the petitioner has specified a large number of errors alleged to have been committed by the trial court (Br. 28–30), he has relied on only two of these as reasons for granting the writ. These are discussed under the first and second heads of this Argument; the remainder are lumped together under a third head.

to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment * * *." *Thompson* v. *United States,* 155 U. S. 271, 274; see *Wade* v. *Hunter,* 336 U. S. 684, 688–690. "* * * In the federal courts the recognized rule is that discharging a jury before verdict is a matter within the sound discretion of the trial court. * * * A defendant who pleads double jeopardy has the burden of proving" abuse of such discretion. *United States* v. *Potash,* 118 F. 2d 54, 56 (C. A. 2). The court below, upon due consideration of the circumstances, concluded that the trial court had not abused its discretion. (R. 1657.) Such a holding presents no question requiring review by this Court.

2. The petitioner contends (Pet. 23–24) that the trial court erred in admitting any of the testimony of one Malin, an accountant whom Ormont's attorney had employed in connection with his (Ormont's) income tax problems, on the ground that all of such testimony came within the attorney-client privilege and was thus inadmissible.[6] The court below correctly held that

[6] The Petition and Brief seem to imply that Malin was permitted to testify with respect to instructions given him

communications by a client to his accountant are not privileged and that, at the conferences among Ormont, Malin and the attorney, Malin's presence was not "indispensable in order for the communication to be made to the attorney * * *." See Wigmore, *Evidence* (3d ed.), Vol. 8, § 2311, p. 602. The court further concluded, on the evidence, that any disclosures which were made by the attorney to Malin were authorized by the petitioner. (R. 1671–1673.) There is nothing in this which requires review by this Court.[7]

3. *Miscellaneous Specifications of Error.*—The petitioner makes numerous other allegations of error which are so plainly lacking in merit, or so thoroughly dealt with by the opinion of the court below, that no extended discussion is here required. Thus, the petitioner argues (Br. 29, 39–41) that he was immune from prosecution because he had appeared and been interrogated before a grand jury in connection with its investigation of price-control violations by some of the slaughterers who supplied him. The short answer to this,

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in the petitioner's presence by the petitioner's attorney. (Pet. 9, Br. 29, 42–45.) This issue is not, however, present, for the petitioner's objections to Malin's testimony concerning such instructions were sustained, and no such evidence was admitted. (R. 1095, 1096, 1102–1103.)

[7] It should also be noted that the petitioner voluntarily furnished to the revenue agents (who testified thereto) substantially the same information as that to which Malin was permitted to testify. (R. 883–887, 1017–1090, 1134–1155, 1169–1195.) Their evidence was clearly admissible and is not here challenged by the petitioner.

made by both courts below, is that the petitioner's testimony before the grand jury was elicited in an attempt to discover whether he had been charged illegal prices by the slaughterers and had nothing to do with the question whether he had wilfully attempted to evade payment of his 1944 income tax. (R. 307, 311, 1661–1663.)

The petitioner likewise asserts (Br. 29, 46–48) that he was prejudiced by being served in the courtroom with a subpoena *duces tecum.* (R. 889–891.) The subpoena was quashed (R. 892), and no claim of prejudice was made by the petitioner at the time. The trial court found that the jury probably was not aware of the incident and that the petitioner had suffered no prejudice thereby (R. 890–891), and the Court of Appeals agreed. (R. 1686–1687.) There is no reason to disturb the findings of the lower courts in such a respect.

The petitioner complains of the trial court's failure to exclude all evidence relating to the years 1942 and 1943, after the court had dismissed the counts relating to these years. But, as both courts below pointed out (R. 1374, 1678), the evidence was admissible as bearing upon the defendant's motive and intent—his wilfullness—in 1944. *Allis* v. *United States,* 155 U. S. 117; *Tinkoff* v. *United States,* 86 F. 2d 868, 879 (C. A. 7); *Rose* v. *United States,* 128 F. 2d 622, 625 (C. A. 10).

The petitioner makes the usual complaints of allegedly improper and prejudicial remarks of counsel for the Government. (Br. 30, 56–58.) The court below, having read the argument in its entirety, found nothing which would constitute reversible error. (R. 1703–1704.) There is no reason for further review. Similarly, petitioner complains of "Erroneous, Confusing, Conflicting Instructions and Failure to Instruct." (Br. 30, 59–63.) The instructions of the trial court cover twenty-five pages of the record (R. 1564–1591), and perusal of them will confirm the conclusion of the court below that "they fully cover the applicable law." (R. 1681–1686, 1707.) Moreover, the objections here urged were not pointed out to the trial court. It is well settled that, unless there are exceptional circumstances not here present, such objections present nothing for review when made for the first time in this Court. *Burns* v. *United States,* 274 U. S. 328, 336; *Pennsylvania R. R. Co.* v. *Minds,* 250 U. S. 368, 375; *United States* v. *Atkinson,* 297 U. S. 157, 159.

CONCLUSION

The decision of the court below rests on the particular facts of the case, is plainly correct, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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